

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

---

MARSHALL SLATER, Personal Representative  
for the Estate of DAWN SLATER, Deceased,

UNPUBLISHED  
December 20, 2007

Plaintiff/Appellant-Cross-  
Appellant,

v

No. 269019  
Antrim Circuit Court  
LC No. 04-008001-NO

CHARTER COMMUNICATIONS, INC.,

Defendant,

and

CONSUMERS ENERGY COMPANY,

Defendant-Appellee,

and

JOHN SHEAHAN,

Defendant/Appellee-Cross-  
Appellant.

---

Before: Jansen, P.J., and Fitzgerald and Markey, JJ.

PER CURIAM.

Plaintiff appeals as of right a judgment entered upon a jury verdict of no cause of action. Defendant John Sheahan cross-appeals that judgment. We affirm.

Plaintiff and his wife, decedent Dawn Slater, were traveling on West Torch Lake Drive in Rapid City when they came upon numerous tress branches that had fallen from a tree and were obstructing the roadway. The weather was rainy and very windy. After clearing the roadway and while returning to their vehicle, a large limb from the same tree broke off, fell onto a power line, and then struck Slater in the head. Slater died the following day as a result of her injuries.

Plaintiff filed suit against numerous parties, including a negligence claim against Consumers Power Company and a premises liability claim against defendant. Plaintiff alleged

that the tree was in Consumers' easement and that Consumers breached its duty owed to the public by failing to remove the dangerous limb from the tree. Plaintiff also alleged that the tree was on defendant's property and that defendant breached his duty owed to the public to maintain his property in a safe condition by failing to remove the dangerous limb from the tree.

Consumers moved for summary disposition under MCR 2.116(C)(10), asserting that the undisputed facts showed that Consumers was not responsible for trimming the tree from which the limb fell. Plaintiff did not respond to the motion, but rather filed a stipulated dismissal in which the parties agreed to dismiss Consumers without prejudice. Plaintiff admitted at the hearing on the motion that he lacked any evidence that Consumers was responsible for the tree. In light of this evidence, the trial court declined to accept the stipulation to dismiss without prejudice, and granted Consumer's motion for summary disposition.

Plaintiff later moved for relief from that order under MCR 2.612(C)(1). Plaintiff relied on the affidavit of professional forester Stephen Alguire, who averred that Consumers might have trimmed the tree fifteen years earlier and that the trimming might have contributed to the decay of the tree. The trial court denied the motion after plaintiff acknowledged that he had no direct evidence that Consumers had trimmed the tree.

Before trial commenced with regard to the claim against defendant, defendant informed plaintiff that it intended to call John Korr, the survey department development manager for Gosling Czubak Engineering Sciences, Inc., to authenticate a tree location survey that had been submitted to the court approximately one year earlier. Defendant's position was that the tree was not on his property but, rather, within the road right-of-way. Plaintiff moved to strike Korr as a witness because Korr was not listed on the expert witness list. After the trial court indicated that it would allow Korr to testify, the court offered an adjournment to allow plaintiff to obtain an independent survey and depose Korr. Plaintiff declined the offer.

After interviewing Korr on the third day of trial, plaintiff informed the trial court that he had just learned that Korr did not conduct the measurements or prepare the survey, but rather had verified the survey. The trial court then allowed Simmerson and Anderson, the individuals who had taken the measurements and prepared the survey, to testify. Following the trial, the jury found that the tree was located in the road right of way and, therefore, judgment was entered in favor of defendant.

Appellant argues that the trial court erred by failing to accept the stipulated order to dismiss Consumers without prejudice. We disagree. The decision whether to accept a stipulated order is reviewed for an abuse of discretion. See *Phillips v Jordan*, 241 Mich App 17, 21; 614 NW2d 183 (2000). An abuse of discretion occurs when the trial court's decision is outside the range of reasonable and principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006). Resolution of this issue also involves discussing the trial court's decision on the motion for summary disposition, which is reviewed de novo. *Collins v Comerica Bank*, 468 Mich 628, 631; 664 NW2d 713 (2003). A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). Summary disposition should be granted under MCR 2.116(C)(10) if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Babula v Roberson*, 212 Mich App 45, 48; 536 NW2d 834 (1995).

Here, the trial court decided not to accept the stipulated dismissal given the lack of evidence to support a finding that Consumers could be liable for damages, as well as the need to resolve the dispute.<sup>1</sup> This decision was not outside the range of reasonable and principled outcomes.<sup>2</sup> Additionally, the motion for summary disposition was properly granted in light of plaintiff's admission at that time that he had no evidence to suggest that Consumers was responsible for the accident.

Further, the trial court did not abuse its discretion by failing to grant plaintiff's motion for relief from that order under MCR 2.612(C)(1)(c) on the ground of misrepresentation. Plaintiff admitted during the motion hearing that he lacked direct evidence to suggest that Consumers had misrepresented that it had not previously trimmed the tree. Although plaintiff presented an affidavit in support of his motion, a motion for reconsideration is used to correct "a palpable error by which the court and the parties have been misled," and not to present new evidence. See MCR 2.119(F)(3); *Maiden v Rozwood*, 461 Mich 109, 126 n 9; 597 NW2d 817 (1999). Accordingly, no abuse of discretion occurred.

Plaintiff next argues that the trial court abused its discretion by allowing Korr, Simmerson, and Anderson to testify. We disagree. The decision whether to allow the late endorsement of an expert witness is reviewed for an abuse of discretion. *Herrera v Levine*, 176 Mich App 350, 355; 439 NW2d 378 (1989).

MCR 2.401(I)(2) provides that a trial court "may order that any witness not listed in accordance with this rule will be prohibited from testifying at trial except upon good cause shown."<sup>3</sup> Where justice so requires, a trial court should not be reluctant to allow an unlisted

---

<sup>1</sup> Appellant relies on MCR 2.507(G) and interpreting case law to suggest that the stipulated dismissal was binding on the trial court. See, e.g., *Mikonczyk v Detroit Newspapers, Inc*, 238 Mich App 347, 349; 605 NW2d 360 (1999) (reasoning that an agreement to settle a dispute is a binding contract on the parties). MCR 2.507(G) governs agreements or consents between parties with respect to whether they are binding on a particular party. However, the court rule and interpreting case law do not require a trial court to accept a stipulated agreement, assuming MCR 2.504(A) does not apply. See also *In re Ford Estate*, 206 Mich App 705, 708; 522 NW2d 729 (1994) (reasoning that a stipulation of law between the parties was not binding because "the parties to a civil matter cannot by their mere agreement supersede procedures and conditions set forth in statutes or court rules").

<sup>2</sup> MCR 2.504(A)(1)(b), which allows a plaintiff to dismiss an action without an order of the trial court, does not apply here because that subrule applies when all the parties in the action agree to dismiss the action. Here, the parties only agreed to dismiss certain claims against certain defendants, not to dismiss the entire action against all defendants.

<sup>3</sup> Appellant suggests that MCR 2.401(I)(2) limits a trial court's discretion by requiring the late endorsing party to provide good cause as to why the potential witness was not disclosed before the witness can be permitted to testify. To the contrary, in using the term "may," it is plain that a trial court retains discretion to prevent an undisclosed witness from testifying unless good cause is shown. In other words, the court is not mandated to act. See *Phinney v Verbrugge*, 222 Mich App 513, 561; 564 NW2d 532 (1997) (reasoning that the term "may" in a statute ordinarily indicates a permissive provision).

witness to testify. *Pastrick v General Tel Co of Michigan and Sub-Surface Constr Co*, 162 Mich App 243, 245; 412 NW2d 279 (1987). “[J]ustice is best served where an unlisted witness can be permitted to testify while the interests of the opposing party are adequately protected,” because neither party is prejudiced and “the jury is afforded a fuller development of the facts surrounding the case.” *Id.* at 246. Generally, a trial court should set appropriate conditions to prevent prejudice and to enable the opposing party to meet the testimony of the new witness. *Id.*

The trial court acknowledged that plaintiff had not deposed Korr, but noted that whether the tree was located on plaintiff’s property or in the road right-of-way were critical factual disputes. The court also noted that the survey was disclosed to plaintiff approximately a year before trial commenced. The court offered plaintiff an adjournment to obtain an independent survey and to depose Korr. Plaintiff would have been able to avoid any actual prejudice if he would have accepted the trial court’s offer. Consequently, no abuse of discretion occurred.<sup>4</sup>

Affirmed.

/s/ Kathleen Jansen  
/s/ E. Thomas Fitzgerald  
/s/ Jane E. Markey

---

<sup>4</sup> In light of this conclusion, we need not address whether the trial court erred in denying defendant’s motion for summary disposition. In any event, we conclude that the trial court did not err by denying the motion, because defendant failed to provide admissible evidence to support the first and second arguments within the motion and because the premises liability claim regarding argument three is not so clearly unenforceable that subsequent factual development would not support the claim.